Hongkew Holdings (M) Sdn Bhd v Hyundai Heavy Industries Co Ltd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–862 OF 1999
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ARIFFIN JAKA JJCA
24 JULY 2007

Civil Procedure — Appeal — Notice of appeal — Failure of trial judge to provide grounds of judgement — Effect on administration of justice

Land Law — Charge — Order for sale — Cause to the contrary — Whether absence of a loan taken by chargee constitutes cause to the contrary — National Land Code1965 s 242(1)

Land Law — Charge — Order for sale — Cause to the contrary — Whether breach of covenant by chargee constitutes cause to the contrary — National Land Code 1965 s 256

The appellant/ defendant ('the appellant') was sued and an order for sale was made against it by the High Court. Despite the appellant having filed a notice of appeal against the decision of the trial court no grounds of judgment was forthcoming, resulting in the appellate court going through the appeal record to appreciate the parties' cases in the trial court. The appellant (chargee) and the respondent (chargor) had entered into a turnkey agreement for the construction of a factory. The appellant was to pay the construction cost of the factory to the respondent by way of installments. The appellant therefore executed a charge in favour of the respondent. The appellant defaulted in the installment payments and the respondent proceeded to obtain an order for sale.The appellant raised the issue of whether cause to the contrary had been shown by the appellant since the appellant had not taken a loan from the respondent. The appellant also appeared to state that a breach of covenant by the respondent relating to the turnkey agreement between both parties would also amount to cause to the contrary.

Held, dismissing the appeal:

(1) Section 242(1) of the National Land Code 1965 ('the Code') does not confine itself to the formation of a charge to secure only a debt but also allows the formation of a charge to secure the repayment of any sum other than a debt. Therefore, installment payments by the appellant to the respondent for the construction of the appellant's factory by the respondent came within the

ambit of s 242(1) in that it was for the repayment of any sum other than a debt, so as to enable the valid creation of a charge over the chargor's (appellant's) property (see paras 2–3).

(2) The appellant cannot use the respondent's failure to carry out its obligations under the turnkey agreement as constituting cause to the contrary so as to set aside the order of sale as the order for sale is not an action on the covenant but a statutory remedy (see para 4).

(3) The appellant had not brought itself within any of the categories of cause to the contrary as limited by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997]1 MLJ 77. Accordingly no cause to the contrary was established by the appellant (see para 5).

Obiter:

All judges should write their grounds of decision. Failure to do so, if widespread, will affect the administration of justice (see para 1); *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 followed.

[Bahasa Malaysia summary

Perayu/defendan ('perayu') telah disaman dan satu perintah jualan telah dibuat terhadapnya oleh Mahkamah Tinggi. Meskipun perayu telah memfailkan satu notis rayuan terhadap keputusan mahkamah perbicaraan tiada alasan penghakiman untuk menyebabkan mahkamah rayuan membaca rekod rayuan meneliti kes-kes pihak dalam mahkamah perbicaraan. Perayu (pemegang gadaian) dan responden (penggadai) telah memasuki perjanjian serah kunci untuk mendirikan satu kilang. Perayu sepatutnya membayar kos pembangunan kilang kepada responden secara ansuran. Perayu dengan itu telah memasukkan gadaian bagi pihak responden. Perayu telah gagal membuat bayaran ansuran dan responden seterusnya telah memperoleh satu perintah jualan. Perayu telah menimbulkan persoalan sama ada kausa bertentangan telah ditunjukkan oleh perayu memandangkan perayu tidak mengambil pinjaman daripada responden. Perayu juga kelihatan seperti mengatakan bahawa satu pelanggaran kontrak oleh responden berkaitan perjanjian serah kunci antara kedua-dua pihak juga boleh membentuk kausa bertentangan.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 242(1) Kanun Tanah Negara 1965 ('Kanun tersebut') tidak menghadkan pembentukan suatu gadaian untuk menjamin hanya suatu hutang tetapi juga membenarkan pembentukan suatu gadaian untuk menjamin bayaran balik suatu jumlah selain hutang. Oleh itu, bayaran ansuran oleh responden terangkum di bawah skop s 242(1) di man ia merupakan bayaran balik untuk suatu jumlah selain hutang, agar membolehkan pembentukan sah suatu gadaian ke atas hartanah penggadai (perayu) (lihat perenggan 2–3).

(2) Perayu tidak boleh menggunakan kegagalan responden melaksanakan obligasinya di bawah perjanjian serah kunci sebagai membentuk kausa

bertentangan agar dapat mengenepikan perintah jualan kerana perintah jualan itu bukan suatu tindakan ke atas perjanjian itu tetapi suatu remedi statutori (lihat perenggan 4).

(3) Perayu tidak terangkum di bawah mana-mana kategori kausa bertentangan seperti yang dihadkan oleh Mahkamah Persekutuan dalam *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997]1 MLJ 77. Oleh demikian tiada kausa bertentangan telah dibuktikan oleh perayu (lihat perenggan 5).

Obiter:

Semua hakim patut menulis alasan keputusan mereka. Kegagalan berbuat sedemikian, jika berleluasa, akan menjejaskan pentadbiran keadilan (lihat perenggan 1); *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 diikut.]

Notes

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1255–1357.

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

Cases referred to

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257 (refd)

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (folld)

Legislation referred to

National Land Code 1965 ss 242(1), 256, 340

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal (by the defendant in the court below) is directed against an order for sale made against it pursuant to s 256 of the National Land Code 1965 ('the Code'). The order was made on 22 February 1999. Notice of appeal was lodged on 2 November 1999. No grounds of judgment were ever written by the learned judge. As such this court was put to the trouble of trawling through the appeal record to appreciate the respective parties' cases in the court below. In this respect this court can do no better than to quote from the judgment of Salleh Abas LP in *Wong Chee Hong v Cathay Organization* [1988] 1 MLJ 92 (at p 94):

> We hope that judges should endeavour to write their grounds of decision and take delight in this aspect of judicial work as a matter of personal pride and satisfaction and not as a burdensome task. Failure on the part of judges to write their grounds of decision will certainly undermine their authority to insist upon magistrates and presidents of sessions courts to write theirs. If the practice of not writing grounds of judgment is widespread, the system of administration of justice will tumble down.

[2] The facts which form the background to this appeal are these. The plaintiff (chargee) and the defendant (chargor) entered into a turnkey agreement to build a cement factory on the defendant's subject land. There was a supplemental agreement but nothing turns on this. The construction cost of USD126m was payable by the defendant to the plaintiff. The sum was payable in instalments, the precise details of which are not relevant for present purposes. In consideration of the foregoing the defendant executed a charge in the plaintiff's favour. The defendant failed to make one or more of the payments under the turnkey contract. The plaintiff having served the statutory demand in Form 16D then took out a summons seeking an order for sale which it obtained.

[3] Before us the only point taken was that there was no loan from the plaintiff to the defendant and therefore the charge was not enforceable. Accordingly, the defendant had shown cause to the contrary. In our judgment the answer to the defendant's submission is to be found in s 242(1) of the Code which says this:

> Every charge to secure the repayment of a debt, *or the payment of any sum other than a debt*, (in either case, whether the amount in question is to be paid as a lump sum or by instalments) shall be effected by an instrument in Form 16A. (Emphasis added.)

The section recognises that a charge may be secured to repay a debt or a sum which is not a debt. In short, Parliament has made it possible for registered proprietors of land to create charges to secure payments such as those in the present case. There is accordingly no merit whatsoever in the point taken by the defendant.

[4] A further submission was made with considerable diffidence that the sum set out in the Form 16D demand was not due. But this argument was not seriously pursued. What the defendant's complaint really boils down to is this. The plaintiff committed a breach of its obligations under the turnkey contract and is therefore not entitled to enforce the charge. This submission fails. For, it is settled law that an application for an order for sale is not an action on the covenant: it is the exercise of a statutory remedy. As Seah SCJ observed in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257 (at p 258):

> The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge.

[5] In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 the Federal Court limited the categories which constitute cause to the contrary under s 256 of the Code. They are: (i) where the chargor is able to successfully impeach the chargee's title to the charge on any of the grounds provided in s 340 of the Code; (ii) where there is a failure on the part of the chargee to meet the conditions precedent for the making of an application for an order for sale; (iii) where to grant an order for sale would contravene some rule of law or equity. The instant defendant has plainly failed to bring the facts of his case within any of these categories. Accordingly no cause to the contrary was established before the High Court.

[6] In the light of the foregoing the appeal was dismissed without the necessity for calling upon counsel for the respondent. The orders usually consequent upon a dismissal were made.

Appeal dismissed.

Reported by Daphne Sebastian